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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 394

FILBEN MANUFACTURING COMPANY, INC., BERNICE M. FILBEN, PATRICIA A. FILBEN, ROSEMARY H. FILBEN, DELORES C. FILBEN, and BERNICE M. FILBEN, as Guardian of Patricia A. Filben, Rosemary H. Filben and Delores C. Filben,

Petitioners,

—v—

ROCK-OLA MANUFACTURING CORPORATION OF DELAWARE and ROCK-OLA MANUFACTURING CORPORATION OF ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Now come the petitioners herein by their duly authorized attorneys and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on July 6, 1948 (R. 153), rehearing denied August 16, 1948 (R. 159).

In support of this petition, your petitioners respectfully show:

Opinions Below

The district court did not prepare or publish an opinion. The opinion of the court of appeals (R. 142) is reported in 168 F. (2d) 919.

Jurisdiction

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, § 1254(1).

Summary Statement of Matter Involved

In 1938, William M. Filben, now deceased, and the respondent Rock-Ola Manufacturing Corporation, a Delaware corporation, each owned letters patent pertaining to automatic phonographs. In August 1938, negotiations were undertaken by a general practitioner representing Mr. Filben and by a patent attorney representing the respondent, looking toward the execution of a cross-license agreement. (R. 69, 70, 71). The cross-license agreement was executed and delivered in Minnesota on September 27, 1938 (R. 14).

The license agreement contained the following sentence: (R. 12)

> "The license herein granted to Filben shall be non-transferable except to a corporation organized and controlled by Filben or except to Filben's heirs or legal representatives."

The license agreement granted to Filben the right to manufacture, use and sell all phonograph inventions then owned or controlled by the respondent, or thereafter acquired, and described it as a "non-exclusive indivisible license." (R. 11).

In 1940, Filben died intestate without having made any transfer of the license. Thereupon, by appropriate proceedings of the probate court, the license rights in question were vested in his widow and in his three minor daughters. (R. 73–76). In 1945, the widow, individually, and as guardian of her daughters,

transferred her individual interest and the interests of her wards in the license agreement to the corporate petitioner formed for the purpose of receiving and exercising such rights, in exchange for stock control of that corporation. (R. 90). Thereafter, the corporate petitioner entered into an exclusive agreement with a manufacturing corporation to manufacture, for the corporate petitioner, machines embodying the licensed invention. (R. 32–37). Later it entered into an agreement to sell another corporation the entire output of automatic phonographs. (R. 39–42). Both of these agreements were terminated prior to trial. (R. 123)

The respondent is a large manufacturer of automatic phonographs, responsible, with two other manufacturers, for the manufacture of eighty-five percent, and responsible individually for the manufacture of twenty-one percent, of all phonographs of this type manufactured in the United States. (R. 52)[1]

The respondent brought suit against the petitioners in the United States District Court for the District of Minnesota, Third Division. It sought a declaratory judgment to the effect that the individual petitioners had no right to assign their interests in the license agreement to the corporate petitioner, and that the corporate petitioner had no right to contract for the manufacture or sale of such phonographs. (R. 4). Both the complaint and the answer put into issue the question of whether the real intent of the parties (regardless of the language used in the license agreement) was that the heirs of William Filben were to have his right to assign the license agreement to a controlled corporation. (R. 6, 16).

Sharply conflicting oral testimony was offered and received

[1]By an assignment prior to litigation, Rock-Ola Manufacturing Corporation, a Delaware corporation transferred all of its assets to an Illinois corporation of the same name. Subsequent to litigation, the assets were reassigned by the Illinois corporation to the Delaware corporation and the Delaware corporation was joined as party plaintiff. The Illinois corporation having no further interest in the litigation, we shall refer to the Delaware corporation as the respondent.

as to the intent of the parties to the license agreement. The district court found all issues of fact and law in favor of the petitioners and expressly found that it was the mutual intent of the parties that the Filben heirs should have the same rights of assignment as were possessed by William Filben, their husband and father. (R. 122). Thereupon, in conformity to the applicable Minnesota law, the district court treated the license agreement as reformed to reflect that intent. (R. 122–124). The district court also construed the license agreement as not prohibiting the corporate defendant from contracting with other corporations for the manufacture and sale of the phonograph. (R. 123).

Without considering a single Minnesota decision, but relying exclusively upon federal decisions prior to *Erie Railroad Co.* v. *Tompkins* and arising from district courts sitting in states other than Minnesota, the court of appeals reversed the district court. The court of appeals (a) construed the license agreement as prohibiting the individual petitioners from transferring their interests to a controlled corporation; (b) independently weighed the conflicting oral testimony of three witnesses and disregarded or set aside the trial court's findings based exclusively on such testimony as to the mutual intent of the parties to the license agreement; (c) concluded, still without reference to Minnesota law, that mutual mistake had not been established and that there was no occasion for reformation of the license agreement; and (d) construed the license agreement as prohibiting the petitioners from contracting for the manufacture and sale of the phonographs by others. (R. 142–153).

Thereafter, in reliance upon the decision of the Court of Appeals for the Eighth Circuit, the respondent filed eight suits in five United States district courts lying in four other judicial circuits against companies now manufacturing or selling the Filben phonograph for the petitioners. There is annexed hereto an affidavit listing such judicial proceedings.

Questions Presented

I. Whether the court of appeals erred in determining that the construction of a cross-license agreement under United States letters patent was a matter of federal law, rather than a matter of state law.

II. Whether the court of appeals erred in determining and applying general law rather than local law with respect to the doctrine of mutual mistake and the right to reformation upon proof of mutual mistake.

III. Whether under Rule 52(a) of the Federal Rules of Civil Procedure, the court of appeals had the power to weigh the sharply conflicting testimony of three witnesses as to the mutual intent of the parties to the license agreement and to disregard and set aside the express finding of the district court resting exclusively on such testimony that the mutual intent of the parties was as contended by the petitioners.

IV. Whether the court of appeals erred in deciding without regard to, and in conflict with, the decisions of the Supreme Court of Minnesota that

(a) The cross-license agreement prohibited the Filben heirs from assigning the license to a controlled corporation, or that

(b) An adequate showing of mutual mistake had not been made so as to entitle the parties to a reformation of the cross-license agreement.

V. Whether the court of appeals erred in construing the license agreement so as to preclude the petitioners from contracting with others for the manufacture of phonographs embodying the licensed patents, or for the sale to others of all of the phonographs manufactured by or for the petitioners.

Reasons for Granting Certiorari

I.

In deciding that the construction of a cross-license agreement under United States letters patent was governed by federal rather than local law, the court of appeals either (a) decided an important federal question in conflict with *Erie Railroad Co. v. Tompkins* and other applicable decisions of this Court, or (b) decided an important federal question which has not been but should be settled by this Court.

The court of appeals was faced with the necessity of construing a cross-license agreement under United States letters patent. Apparently under the misapprehension that the construction of a cross-license agreement under United States letters patent was a matter of federal law, the court of appeals reversed the district judge sitting in Minnesota, relying exclusively upon federal decisions prior to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and without reference to any Minnesota decisions or to Minnesota law. That the court of appeals was applying federal rather than state law may properly be determined from an examination of the authorities upon which it relied. As this Court said in *Klaxon Company v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941):

> "Application of the New York statute apparently followed from the court's independent determination of the 'better view' without regard to Delaware law, for no Delaware decision or statute was cited or discussed."

It is, of course, established that the construction of contracts generally is a matter of local and not federal law. And failure to apply local law is not merely error, but constitutes an unconstitutional usurpation of power by the court of appeals.

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202 (1938).

Nor is a different conclusion permissible because the particular contract involved happens to be a cross-license agreement under United States letters patent. Thus, it has regularly been held that the federal courts are without jurisdiction to entertain suits upon license and other contracts involving patents in the absence of diversity of citizenship. *Luckett v. Delpark, Inc.*, 270 U.S. 496 (1926); *Geneva Furniture Manufacturing Co. v. S. Karpen & Bros.*, 238 U.S. 254 (1915); *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U.S. 282 (1902). As a corollary, this Court has held that although the federal courts have exclusive jurisdiction of all cases arising under the patent laws, the state courts have jurisdiction of suits upon contracts involving patents. *New Marshall Engine Co. v. Marshall Engine Co.*, 223 U.S. 473 (1912). *Cf. Miller v. O.B. McClintock Co.*, 210 Minn. 152, 297 N.W. 724 (1941).

In *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942), this Court mooted the question of whether (absent a violation of the federal anti-trust laws) federal or state law governed the alleged estoppel of a licensee to challenge the validity of a patent (at 175). We do not believe that the *Sola* case intended to call into question the line of decisions just noted.[2] But for the purpose of determining whether the writ should issue, it is immaterial. If the *Sola* case does not call the prior decisions into question, then the court of appeals decided an important question of federal law in conflict with applicable decisions of this Court; if it does call the prior decisions into question, then the court of appeals, in applying feder-

[2] For example, in *Nachman Spring-Filled Corporation v. Kay Mfg. Co.*, 139 F. (2d) 781, 784 (C.C.A. 2d 1943), the court seemed to construe the *Sola* case as suggesting that state law would apply, absent a violation of the anti-trust laws. But *cf. MacGregor* v. *Westinghouse Electric & Manufacturing Co.*, 329 U.S. 402 (1947).

al law to the construction of a cross-license agreement under United States letters patent, has determined an important question of federal law, which should be authoritatively settled by this Court.

II.

In determining and applying general law with respect to mistake and reformation rather than Minnesota law, the decision of the court of appeals conflicts both with applicable decisions of this Court and with decisions of other courts of appeals.

The district court made express findings that the intent of the parties was that the Filben heirs should have the right to assign the cross-license agreement to a controlled corporation and treated the agreement as reformed to reflect that intent. (R. 122). In determining the legal principles governing mistake and reformation, the court of appeals relied exclusively upon federal decisions, all prior to *Erie v. Tompkins*, and made no investigation of, or reference to, the law of Minnesota. (R. 149–50). As will appear hereafter (*infra*, pp. 16–18), there are numerous Minnesota decisions establishing the local law with respect to mistake and reformation.

As we have pointed out, proceeding without regard to Minnesota law constituted an unconstitutional usurpation of power by the court of appeals. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 77-80 (1938). Moreover, such a procedure is in direct conflict with two decisions of the United States Court of Appeals for the Tenth Circuit.

Thus, in *Tulsa City Lines v. Mains*, 107 F. (2d) 377 (C. C. A. 10th, 1939), that court was faced with the necessity of applying

the law of mistake to an unconditional, unambiguous release. The Court of Appeals for the Tenth Circuit said (at 380):

> "It is urged that the court was not authorized as a matter of law to set aside the release on the ground of mutual mistake. The question must be determined by the law of the State of Oklahoma."

In *Montgomery Ward & Co. v. Callahan*, 127 F. (2d) 32 (C. C. A. 10th, 1942), the same court was faced with precisely the same question which this time arose in a district court sitting in Kansas. In that case, the court of appeals said "the soundness of this position must be determined from the laws and decisions of Kansas." (127 F. (2d) at 34). The court then considered the law of Kansas. It properly regarded its prior decision applying the law of Oklahoma to the same issue as irrelevant and did not even cite it.

This correct procedure should be contrasted with that of the court of appeals in this case where principal reliance was placed upon its own prior decision in *Westinghouse Electric & Mfg. Co. v. Tri-City Radio Electric Supply Co.*, 23 F. (2d) 628 (C. C. A. 8th, 1927), a case decided prior to the *Erie* case and arising from an Iowa district court. At that time, the court was bound to apply, not local law as now, but general law. *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

III.

In independently weighing the conflicting testimony of three witnesses and disregarding the finding of fact of the district court resting exclusively on such testimony, the court of appeals either disregarded or wrongly interpreted Rule 52 (a) of the Federal Rules of Civil Procedure.

Both the complaint and the answer put squarely into issue

the question of the intent of the parties with respect to the transferability of the cross-license agreement. (R. 6, 16).[3]

The license agreement was negotiated by Mr. Baskfield on behalf of Mr. Filben, the father and husband of the individual petitioners, and by Mr. Davis, on behalf of the respondent. Both of these persons testified as to the mutual intent of the parties. In addition, Mr. Rockola, respondent's president, also testified as to his own intent. Mr. Baskfield testified that as part of the negotiations, he had requested that something be done "to take care of the heirs so they would stand in the shoes of Mr. Filben." (R. 71). He testified to a conversation with Mr. Davis in drafting the cross-license agreement to the effect that "we were attempting to get language in there that would place them [the heirs] in the shoes of Mr. Filben in the event of his death." (R. 72). And later on, he testified as follows: (R. 72–73)

> "Q. Was any representation made that paragraph 4 as drafted would confer the same rights on Filben's heirs that Mr. Filben would enjoy under the agreement?
>
> "A. Well, Mr. Davis and I discussed it at the time it was drafted, and we were both in agreement that the heirs would stand in the shoes of Mr. Filben.
>
> "Q. The same position as Mr. Filben?
>
> "A. Yes.

[3] Paragraph VI of the complaint is in part as follows: "Plaintiff avers that it was the *intention of the parties* to said Filben-Rock-Ola agreement that . . . in the event of the decease of said William M. Filben without his having transferred said license, his heirs and legal representatives should succeed to the licensed rights by said agreement granted to said Filben personally, but without acquiring any right to transfer to any other person or corporation the right to manufacture and sell the patented phonographs." (R. 6).

Paragraph III of the answer alleges that "it was the *intention of the parties* to the agreement . . . to extend to the heirs of William M. Filben all of the rights, privileges, and immunities granted to said William M. Filben, including the right to transfer to the corporation controlled by said heirs the said Filben-Rock-Ola agreement." (R. 16).

"Q. Did you so assume when this agreement was drafted?

"A. I did.

"Q. And that very subject was discussed between you and Mr. Davis?

"A. Yes."

Davis testified on behalf of the respondent. (R. 111–113). In particular, he testified as follows: (R. 113)

"Q. Was there any intent in your mind or activity with respect to the consummation of this agreement that the right to assign to a corporation the interests inherited by the Filben heirs should be vested in them?

"A. Certainly not."

Upon this diametrically opposed testimony, the district court found that: (R. 122)

"5. It was the intention of the parties to said license agreement to grant, and by said agreement there was granted, to the heirs of the said William M. Filben the right to transfer and assign their license rights thereunder to a corporation controlled by them."[4]

The court of appeals disregarded both the testimony and the finding of the district court. After wrongly saying that there was no claim that there was a mutual mistake, the court of appeals said (R. 150):

---

[4] It should be kept in mind in connection with the words "and by said agreement there was granted" that under well-established Minnesota law, nothing need be done to reform an instrument where the facts show a mutual mistake, and the trial court is under a duty to treat the instrument as reformed. *Leach v. Leach*, 162 Minn. 159, 202 N.W. 448 (1925) (discussed *infra*, pp. 16–17); *First National Bank v. Northwestern Trust Co.*, 181 Minn. 115, 231 N.W. 790 (1930). As the Supreme Court of Minnesota put it in the *Leach* case, "an actual reformation was not necessary, for, if the right to a reformation is shown, the court should treat the defective instrument as reformed."

> "The most that can be said with reference to this testimony is that the attorney representing the interest of the defendants at the time of the negotiations leading to the execution of the license contract thought that the rights to be granted Filben should extend, in the event of his death, to his heirs, but the attorney for the plaintiff had no such thought, nor did Mr. Rockola, who represented the plaintiff, *and hence, there could have been no mutual mistake.*" (Italics supplied)

This summary by the court of appeals completely misstates the testimony by Baskfield that it was the *mutual* understanding between him and Davis that the Filben heirs were to have the same rights as Filben. (R. 71-73).

Moreover, in weighing the testimony of the three witnesses, the court of appeals disregarded the opportunity of the trial court to judge their credibility and disregarded his right to disbelieve Messrs. Rockola and Davis if he saw fit to do so. The court of appeals disregarded the clear command of Rule 52(a) that the trial court's "findings of fact should not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It is so well settled as not to require the citation of authority that where the findings of a trial court rest exclusively upon a conflict of testimony between witnesses, his findings are unassailable. See *e.g. Walling v. General Industries Co.*, 330 U.S. 545 (1947); *United States v. Aluminum Co. of America*, 148 F. (2d) 416, 433 (C.C.A. 2d 1945).

IV.

The decision of the court of appeals is in conflict with applicable decisions of the Supreme Court of Minnesota with respect to important questions of local law.

The fact that the court of appeals applied federal law to the construction of a cross-license agreement, and federal law to

determine the applicable doctrine of mistake and reformation, is of itself a sufficient ground for the issuance of a writ of certiorari, even though subsequent examination should prove the law of Minnesota to be identical to that applied. But in point of fact, the decision of the court of appeals is in conflict with numerous decisions of the Supreme Court of Minnesota.

A. The Minnesota Courts Regularly Permit Resort to Extrinsic Evidence Where the Agreement is Ambiguous, or Even if Unambiguous, Where it Becomes so When Applied to the Subject Matter.

One of the critical questions is whether the heirs of William Filben possessed the right under the cross-license to transfer the license to a controlled corporation. The pertinent provision of the agreement is as follows: (R. 12)

> "The license herein granted to Filben shall be non-transferable except to a corporation organized and controlled by Filben or except to Filben's heirs or legal representatives."

The court of appeals, without regard to Minnesota law, held this language to be unambiguous, hence not to permit extrinsic evidence of the intent of the parties as an aid to its interpretation, and construed it as preventing the heirs from transferring the license in the same manner as could Mr. Filben. It is true that the phrase "except to Filben's heirs or legal representatives" has an unambiguous literal meaning. But when the language is read in connection with the right given to Filben to transfer "to a corporation organized and controlled by Filben," and when it is sought to be applied to the subject matter of the contract, the result is so incongruous as to make clear that, at very least, extrinsic aids to construction are urgently required.

Thus, if Mr. Filben in his lifetime had transferred his license to a controlled corporation, as he had an admitted right to do,

and then died, the petitioners would have inherited his shares of stock and be unchallenged in precisely the position in which they now are. But it is now urged, and the court of appeals found, without a semblance of rational purpose, that the Filben heirs are now unable to do that which could have been done for them by Mr. Filben. The absurdity and incongruity of this interpretation are emphasized when it is noted that Mr. Filben, who needed it less, could secure the protection and effectiveness of a corporate organization, while his heirs, a widow and three minor daughters, are required to engage in the development of the licensed patents in their individual capacities.

It is well settled by Minnesota law that when the application of seemingly clear language to the subject matter of the contract produces incongruity, evidence of intent is admissible to aid interpretation.

In *Wilmot v. Minneapolis Automobile Trade Association*, 169 Minn. 140, 210 N.W. 861 (1926), the agreement entitled the plaintiff to ten percent "of the net profits or net receipts" of an automobile show. The supreme court approved the resort by the trial court to parol evidence to show that what was intended was a peculiar and unorthodox method of computing the commissions. The Supreme Court of Minnesota said:

> "The duty of courts is to apply contracts to their subject-matter and so effect the purpose of the parties. Their interpretation is incidental. To accomplish the main object, resort may and frequently must be had to the circumstances under which the contract was made, and, if there be need for resort to extraneous aids to construction, it is immaterial whether such need arises from an uncertainty in the instrument itself, or that being clear, standing alone, it ceases to be so, and ambiguity arises when the contract is applied to its subject-matter. In either case construction must follow, and resort must be had to the aids furnished by extrinsic circumstances. The prohibition of the law is

not against their being used for interpretation, but against making them the instruments of contradiction of an expressed contractual intent. The old distinction between patent and latent ambiguities, never more than 'an unprofitable subtlety' (Thayer, Preliminary Treatise on Evidence, 434), 'so far as contracts are concerned, * * * may be wholly disregarded.' 2 Williston on Contracts, §627.

* * *

"The query is: Was it proper to admit testimony that the audit was made in the same manner that it had been for years, and that during all the time plaintiff had acquiesced in it? A negative answer is impossible, because it would thwart the one purpose of construction, which is to ascertain the intention of the parties themselves. It would sacrifice rationalism to that 'primitive formalism which views the document as a self-contained and self-operative formula,' rather than an instrument the whole of which is in relation to extrinsic matter, and concerning which very frequently there can be no adequate understanding of purpose, without first an understanding of the extrinsic facts and things upon which the writing must have its only operation. 4 Wigmore on Evidence, 3499." (Underscoring supplied)

This liberal attitude of the Minnesota courts has been reaffirmed time and time again. For example, in *In re Soper's Estate*, 196 Minn. 60, 264 N.W. 427 (1935), the court cited the *Wilmot* case with approval and approved the use of parol evidence to show that when the settlor of an insurance trust used the term "wife" to describe the beneficiary, he did not mean his lawful wife, but the woman with whom he was living.

In *A. E. Little Co.* v. *John W. Thomas & Co., Inc.* 174 Minn. 87, 218 N.W. 242 (1928), the supreme court construed an agreement by the lessee to purchase the fixtures installed by the lessor "in the event the term of this lease shall be extended" as not to mean extension by operation of law. See also *City of Marshall v. Gregoire*, 193 Minn. 188, 259 N.W. 377 (1935).

And in the *Little* case, as well as throughout the Minnesota decisions, there appears the constant warning that "contracts are to be construed so far as possible to avoid absurd or unjust results." *Burnett v. Hopwood*, 187 Minn. 7, 244 N.W. 254 (1932).

Examination of these and other Minnesota cases leads to the inevitable conclusion that under Minnesota law the absurd conclusion reached by the court of appeals would have been avoided, and that, in any event, the Minnesota court would have permitted the use of parol evidence as an aid to construction.

B. In Any Event, under Minnesota Law, Proof of Intent Was Plainly Admissible to Show Mutual Mistake and the Minnesota Courts Are Extremely Liberal in the Application of the Doctrine.

Quite apart from the use of parol evidence to show intent as an extrinsic aid to construction, the Supreme Court of Minnesota has regularly held that proof of intent is always admissible to show mutual mistake, and that mistake as to the legal meaning of the words used is a ground for reformation. Here, too, the Minnesota court is extremely liberal.

A leading case is that of *Leach* v. *Leach*, 162 Minn. 159, 202 N.W. 448 (1925). The case seems to us to be on all fours with this one and to control its disposition. There a son and daughter-in-law borrowed $2,000 from the mother, giving an unqualified promissory note to repay the money with interest. The mother brought suit upon the promissory note in a law case before a jury. The promissory note, of course, was completely unambiguous. The daughter-in-law introduced evidence to show that it was never intended that the principal should be repaid to the mother in her lifetime, but that it had been the intent of the parties that the money was to constitute an advance to the son against his mother's estate. The jury returned

a verdict for the defendants. Upon appeal based upon the supposed error in receiving the evidence of intent, the Supreme Court of Minnesota affirmed, saying:

> "If it was the intention of the parties that the relation of debtor and creditor should not exist, they made a mistake in wording the note as they did. The note is presumed to set forth correctly the agreement they made, but parol evidence is admissible to show a mutual mistake in reducing the terms of the agreement to writing. If the note were reformed by striking out the provision for the payment of the principal, it would express the true agreement of the parties and prejudice the rights of no one. Although the provisions of the note were known when it was executed, the parties were mistaken as to the legal effect of the instrument. In such a case equity will correct the mistake and make the instrument conform to the true agreement, for the rigor of the doctrine that there can be no reformation for a mistake of law has been greatly relaxed. Hines v. Bauer (Minn.) 197 N.W. 483; Dun. Dig. & Supp. §8330.
>
> "Had the respondent brought suit for a reformation of the note, she would have prevailed if she established to the satisfaction of the court the facts upon which she here relies as a defense.
>
> * * *
>
> "Instead of following the cumbrous mode of procedure which formerly prevailed, she could plead defensively any facts which would give her a right to have the note reformed. An actual reformation was not necessary, for, if the right to a reformation is shown, the court should treat the defective instrument as reformed. Rogers v. Castle, 51 Minn. 428, 53 N.W. 651; Scofield v. Quinn, 54 Minn. 9, 55 N.W. 745; Pomeroy's Code Remedies, §30, 31, 32, 34."

In *Segerstrom* v. *Holland Piano Mfg. Co.*, 155 Minn. 50, 192 N.W. 191 (1923), the Supreme Court of Minnesota held that even though the parties intended to use the very words em-

ployed, if the words did not express the meaning which the parties intended to convey and there is a mistake as to their legal meaning and effect, reformation will be granted. *Accord: Wall* v. *Meilke*, 89 Minn. 232, 94 N.W. 688 (1903); *Papke* v. *Pearson*, 203 Minn. 130, 280 N.W. 183 (1938).

The pleadings put the intent of the parties squarely in issue. (R. 6, 16). The trial court found the intent of the parties to the license agreement to be that the Filben heirs should have the right to transfer the license to a controlled corporation. The court of appeals concluded that the language of the license agreement did not permit such a transfer. Under these circumstances, Minnesota law requires the reformation of the license agreement. Moreover, under Minnesota law it was unnecessary for the trial court affirmatively to reform the agreement, but rather, it was his duty, with or without actual reformation, to treat the agreement as reformed. *Leach v. Leach*, 162 Minn. 159, 202 N.W. 448 (1925); *First National Bank* v. *Northwestern Trust Co.*, 181 Minn. 115, 231 N.W. 790 (1930). This the district court did. (R. 122).

We think it is worth noting that although the district judge has had long experience with Minnesota law, none of the judges of the court of appeals had been Minnesota attorneys. *Cf. Hillsborough* v. *Cromwell*, 326 U.S. 620, 630 (1946).

V.

The volume of litigation provides still another reason why the writ of certiorari should issue.

Following the decision of the court of appeals here sought to be reviewed, the respondents have filed eights suits in five districts lying in four judicial circuits against persons manufacturing or selling the Filben phonograph for the corporate peti-

tioner pursuant to the assignment of the license agreement by the Filben heirs. The suits are for infringement of the licensed patents. An affidavit annexed hereto lists such litigation. Volume of litigation has been recognized as at least a partial ground for the issuance of the writ. *United States* v. *Constantine*, 296 U.S. 287 (1935); Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 576, 597 (1938).

The review by this Court of the decision of the court of appeals and the determination of the questions thereby presented would relieve the lower federal courts by making unnecessary this extensive litigation. Moreover, it would relieve the petitioners, as small manufacturers, from the oppressive burden and adverse competitive effects of large-scale litigation against one of the most powerful factors in the industry. (R. 52, 63).

Wherefore, the petitioners pray for the allowance of a writ of certiorari to the United States Court of Appeals for the Eighth Circuit in the case entitled *Rock-Ola Manufacturing Corporation, et al.*, Appellants, vs. *Filben Manufacturing Company, et al.*, Appellees, No. 13695, in order that this case may be reviewed and determined by this Honorable Court.

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AFFIDAVIT

STATE OF ILLINOIS }
COUNTY OF COOK } SS

The undersigned, Ben W. Heineman, being first duly sworn according to law, deposes and says:

1. That he is one of the attorneys for the petitioners and one of the attorneys for the Filben Corporation and for the National Filben Corporation, corporations duly organized and existing under the laws of the State of Illinois, and, respectively, manufacturing and selling the Filben phonograph for the account of the corporate petitioner pursuant to the transfer from the individual petitioners to the corporate petitioner of the cross-license agreement constituting the subject matter of these proceedings.

2. Subsequent to the decision of the Court of Appeals for the Eighth Circuit in the proceedings entitled *Rock-Ola Manufacturing Corporation, et al.*, v. *Filben Manufacturing Company, Inc., et al.*, Docket No. 13695, the respondent has instituted legal proceedings for infringement of the licensed patents against persons manufacturing or selling for the petitioners and against their sales agents as follows:

Name of Proceeding	District Court of the United States	Docket Number
Rock-Ola Manufacturing Corporation vs. Filben Corporation	Northern District of Illinois, Eastern Division	48C1455
Rock-Ola Manufacturing Corporation vs. National Filben Corporation	Northern District of Illinois, Eastern Division	48C1456
Rock-Ola Manufacturing Corporation vs. Apex Cigarette Service, Inc.	Northern District of Illinois, Eastern Division	48C1457

Name of Proceeding	District Court of the United States	Docket Number
Rock-Ola Manufacturing Corporation vs. Jack Nelson, d.b.a. Jack Nelson Co.	Northern District of Illinois, Eastern Division	48C1458
Rock-Ola Manufacturing Corporation vs. James P. Blackwell, d.b.a. Blackwell Distrilbuting Co.	District of Colorado	2547
Rock-Ola Manufacturing Corporation vs. E. T. Mape Distributing Co.	Northern District of California, Southern Division	28348-R
Rock-Ola Manufacturing Corporation vs. William Shayne, d.b.a. Shayne-Dixie Music Company	Southern District of Florida	2679-M
Rock-Ola Manufacturing Corporation vs. United Coin Machine Co., Inc.	Eastern District of Wisconsin	4593

Further affiant sayeth not.

/s/ B. W. Heineman

Subscribed and sworn to before me
this 2nd day of November, 1948.

/s/ B. A. Boehm,
Notary Public

NOTARIAL SEAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 394

FILBEN MANUFACTURING COMPANY, INC., BERNICE M. FILBEN, PATRICIA A. FILBEN, ROSEMARY H. FILBEN, DELORES C. FILBEN, and BERNICE M. FILBEN, as Guardian of Patricia A. Filben, Rosemary H. Filben and Delores C. Filben,

Petitioners,

—v—

ROCK-OLA MANUFACTURING CORPORATION OF DELAWARE and ROCK-OLA MANUFACTURING CORPORATION OF ILLINOIS,

Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

I.

In the petition for certiorari, we pointed out that the court of appeals had deemed the interpretation and construction of a cross-license agreement under United States letters patent to be controlled by general or federal law, rather than by Minnesota law. Respondent argues that the court of appeals was correct in that determination. Respondent expressly states that (Resp. Br. 5):

> "... the law to be applied to the construction of the Rock-Ola-Filben agreement in that respect is general or Federal law, and not a matter of State law since it is purely a matter of patent license interpretation."

We say that a license agreement is a contract like any other, and that the court of appeals and respondent are in error in concluding otherwise. The decision of the court of appeals is in conflict with the decisions of this Court in *Erie Railroad Co. v. Tompkins*, and in the other cases enumerated in our petition. (Pet. 6–8.) For this reason alone the writ should issue.

The respondent relies on *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173 (1942) and *MacGregor v. Westinghouse Electric & Manufacturing Co.*, 329 U.S. 402 (1947) to support the view of the court of appeals. (Resp. Br. 5.) As the petition for certiorari states, we do not so view these decisions, but in any event, the question presented is of such manifest importance as to impel the issuance of the writ by this Court.

II.

Respondent concedes that petitioners fully presented to the court of appeals the Minnesota law with respect to mistake and reformation, but argues that there was no necessity for the court of appeals to rely on Minnesota decisions, if the federal authorities are "in line" with Minnesota law. Respondent concludes by saying that the federal law "does not differ *fundamentally*" from Minnesota law. (Resp. Br. 5–6.)

The petitioners have a constitutional right to have the court of appeals investigate and apply local law in the decision of non-federal questions. The court of appeals ignored the numerous Minnesota decisions, and relied exclusively upon one irrelevant "general law" decision of its own decided prior to *Erie Railroad Co. v. Tompkins*. The inevitable conclusion is that the court of appeals did not regard Minnesota law as controlling (or in any event did not investigate and apply it) and deprived petitioners of that constitutional right. *Klaxon Company v. Stentor Electric Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941).

III.

Respondent does not deny that the court of appeals independently weighed the conflicting testimony of three witnesses

and set aside the finding of the trial court resting upon the testimony of the witness for petitioners. Instead, it argues that the court of appeals was justified in so doing. (Resp. Br. 14–19.)

Respondent supports the conclusion reached by the court of appeals by arguing that petitioners' witness was an interested person and that little weight should have been given to his testimony. (Resp. Br. 15.) Respondent also argues the weight and effect to be given the testimony of respondent's witnesses, Messrs. Rock-Ola and Davis.[1] These are arguments which were properly addressed to the district court, but which have no validity in a reviewing court. We deny that under Rule 52(a) the court of appeals has any power to set aside a finding of the district court resting exclusively upon conflicting oral testimony by witnesses whom the district court had an opportunity to observe. Under such circumstances, no reviewing court can state from a written record that the finding of the trial court is "clearly erroneous" as required by the Rule. Nowhere has the foundation for the Rule been better stated than in *United States v. Aluminum Co. of America*, 148 F. (2d) 416 (C.C.A. 2d, 1945) where the court of appeals, speaking through Judge Learned Hand said (at 433):

> "However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must

---

[1] Respondent did not point out what is perfectly obvious in any event—that Mr. Rock-Ola, who is president of the respondent, which bears his name, and that Mr. Davis, the attorney who represented respondent in the negotiations with Filben, were also interested persons. Negotiations are not customarily conducted by persons without an interest in the subject matter. And interest frequently arises merely from the fact of having conducted negotiations. But, in any event, the weight to be given to the bias of witnesses is for the trial court and not for the court of appeals or this Court.

be treated as unassailable.' *Davis v. Schwartz*, 155 U.S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson v. Gilliland*, 242 U.S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, for the printed word is only a part, and often by no means the most important part, of the sense impressions which we use to make up our minds."

Moreover, the respondent continually stresses the asserted fact that the Supreme Court of Minnesota frequently reviews the facts in mistake and reformation cases. We are contending for the application of the substantive law of Minnesota to the interpretation of the license agreement and to the doctrine of mistake and reformation. But the procedural question of what effect should be given to findings of a federal district court is plainly governed not by Minnesota law, but by Rule 52(a).

For the reasons set forth in the petition for writ of certiorari, as well as those set forth above, the writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be allowed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 394.

FILBEN MANUFACTURING COMPANY, INC., BERNICE M. FILBEN, PATRICIA A. FILBEN, ROSEMARY H. FILBEN, DELORES C. FILBEN, AND BERNICE M. FILBEN, AS GUARDIAN OF PATRICIA A. FILBEN, ROSEMARY H. FILBEN AND DELORES C. FILBEN,

Petitioners,

vs.

ROCK-OLA MANUFACTURING CORPORATION OF DELAWARE AND ROCK-OLA MANUFACTURING CORPORATION OF ILLINOIS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL STATEMENT OF FACT.

As a matter of accuracy, we point out that there are no patents specifically listed in the Rock-Ola-Filben agreement, but merely a recital of patent applications owned by the two contracting parties (Rec. 10).

The license granted by each of the contracting parties to the other was limited to phonographs of the "Filben type" on the one hand, and to phonographs of the "Rock-Ola type" on the other hand (Rec. 11).

Batavia Metal Products, Inc., with whom Petitioner, Filben Manufacturing Co., Inc., entered into an agreement for manufacture of the licensed Filben phonographs, and U. S. Challenge Co. with whom the same Petitioner entered into an agreement for sale of all Filben phonographs, were virtually one and the same corporation, as is evidenced by the signatures to such agreements (Rec. 36, 41); by the fact that they were signed on successive days, namely November 1, 1945, and November 2, 1945 (Rec. 32, 39); by the physical Exhibits 5 and 6, annual reports of those two companies filed with the Secretary of State of Illinois in the year 1946; and by the testimony of Petitioners' witness Baskfield (Rec. 102, 103).

It was the entry into those agreements by Petitioner, Filben Manufacturing Co., Inc., which formed the gravamen of Respondents' complaint, which charged those agreements to be in effect an effort to transfer Filben's right to manufacture and Filben's right to sell under the Rock-Olo-Filben license agreement, and the Court of Appeals properly held that those agreements were in violation of the Filben license (Rec. 151, 152).

Prior to the trial of this cause, Petitioners were required to produce copies of any and all agreements entered into between them, or any of them and other companies or individuals, relating to the manufacture or sale of Filben phonographs. In compliance with that demand, there was produced an agreement (Exhibit 4) between Petitioner, Filben Manufacturing Co., Inc., and one Sam Mannarino (Rec. 43, *et seq.*).

At the trial, Baskfield (President of Petitioner, Filben Manufacturing Co., Inc.) testified that while that con-

tract had been signed by both parties to it, it had not been delivered and was not a binding and existing agreement (Rec. 94).

It now appears from the Affidavit of counsel for Petitioners included in the Petition, that others are now engaged in manufacturing and selling Filben phonographs, presumably under contracts of the sort complained of in the original Bill of Complaint in this case.

Only two simple issues are really involved in this controversy, and of those, only one appears to be before this Court.

The two real issues before the lower Courts were:

(1) The right of the Filben heirs, Petitioners, under the Filben-Rock-Ola contract to assign their interest in that agreement to the Filben Manufacturing Co., Inc., Petitioner,

and

(2) The right of the Filben Manufacturing Co., Inc., Petitioner, or any of the Petitioners, to vest in others the right to manufacture Filben phonographs under the Filben-Rock-Ola agreement, and similarly, the right to sell Filben phonographs under that agreement in the manner provided in the contract entered into between Petitioner, Filben Manufacturing Co., Inc., and U. S. Challenge Co.

As to the first issue, Petitioners contend that the Court of Appeals was in error in holding that the Filben heirs did not succeed to Filben's right under the Filben-Rock-Ola agreement to assign his interest in that agreement to a corporation organized and controlled by him.

The contract is clear and unambiguous with respect to the rights of the heirs acquired by inheritance from licensee, Filben:

> "The license herein granted to Filben shall be non-transferable except to a corporation organized and controlled by Filben, or except to Filben's heirs or legal representatives" (Rec. 12).

In short, while Filben was given a right to assign, that right was not extended to his heirs.

Petitioners' challenge of the decision of the Court of Appeals to that effect is based wholly upon an alleged mutual mistake by the original contracting parties, Filben and Rock-Ola Manufacturing Corp.

In so contending, Petitioners are virtually conceding that there is no ambiguity or uncertainty or lack of clarity in the provision of the contract quoted above.

In other words, *mutual* mistake must be proved for Petitioners to obtain a sanction of the alleged right of the Filben heirs to vest their interest in the Rock-Ola-Filben agreement in the Petitioner, Filben Manufacturing Co., Inc.

As to the second issue outlined above, the Court of Appeals' holding found that Petitioners had no right to enter into agreements of the sort which were entered into with Batavia Metal Products, Inc., and U. S. Challenge Co.

There is nothing presented to the Court in the Petition before it on this issue, except that under "Questions Presented" appears the following:

> "V. Whether the court of appeals erred in construing the license agreement so as to preclude the petitioners from contracting with others for the manufacture of phonographs embodying the licensed patents, or for the sale to others of all of the phonographs manufactured by or for the petitioners" (Pet. 5).

Since no argument or reasoning is included in the Petition, we submit that the question is not before this Court, and will not be considered by this Court in line with its customary practice in dealing with such Petitions.

Incidentally, as to the issue of Petitioners' right to divide and transfer the right to manufacture and the right to sell, the law to be applied to the construction of the Rock-Ola-Filben agreement in that respect is general or Federal law, and not a matter of State law since it is purely a matter of patent license interpretation, just as was the question of licensee-estoppel and illegal licensee restriction in the cases of *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, and *MacGregor* v. *Westinghouse Electric & Mfg. Co.*, 329 U. S. 402, respectively.

The decision of the Court of Appeals is not in conflict with the Minnesota law or authorities.

Throughout both Minnesota decisions and Federal decisions bearing upon the question of mutual mistake in the drafting of contracts, runs a common thread. That is the repeated insistence by both State and Federal Courts that **mutual mistake of such character as to warrant a reformation of a contract, must be clearly and convincingly proved.** That, as we shall point out, was not done in the case at bar, as the Court of Appeals clearly recognized.

It is repeatedly asserted in Petitioners' argument that the Court of Appeals disregarded and ignored the law of Minnesota as established by decisions of the highest Court of that State.

We point out that briefs of the Defendants below were replete with citations of Minnesota authorities; *i. e.*, decisions of the Minnesota Supreme Court. To imply that the Court of Appeals did not give consideration to these decisions seems to us a slur upon the Court and an attack upon its conduct of the case.

It is also asserted:

> "* * * that although the district judge has had long experience with Minnesota law, none of the judges

of the court of appeals had been Minnesota attorneys'' (Pet. p. 18).

We do not know the basis for this statement. Certainly nothing in the record justifies it or supports it.

To imply, as is done in this statement, that the Court of Appeals is not acquainted with Minnesota law is absurd in the extreme. As this Court will recognize, that Court of Appeals has been sitting in Minnesota for many years, and it is inconceivable that it has not been confronted with questions of Minnesota law upon contractual and other issues over its period of existence.

If, as we submit, Federal citations relied upon by the Court of Appeals are in line with the weight of authority of the Minnesota Supreme Court, we see no reason why citation of Minnesota cases was required of that Court.

The Federal or general law respecting mutual mistake as a basis for reformation of a contract, does not differ fundamentally from the law as applied by the highest court of the State of Minnesota in many decisions.

Fundamentally, both Federal law and Minnesota law follow the doctrine set forth in Williston on Contracts, Vol. 3, p. 2820, in the following words:

> ''Though equity will not permit the parol evidence rule to prevent it from granting relief for mistake, 'the purpose of a written contract is to furnish a record of the terms of the agreement of the parties not easily impeached, and thereby to avoid subsequent disputes and conflicting testimony and claims regarding its terms and their meaning. To accomplish this purpose, and to prevent such disputes from annulling written agreements, two rules have been firmly established in equity: First, that the burden is on the complainant to prove the mutual mistake, or the mistake of one party and the deceit, fraud, or inequitable conduct of the other, upon which he relies for a modification or avoidance of the contract; and,

second, that in view of the written record of the terms of the agreement made at the time a preponderance of the evidence is insufficient, and nothing less than evidence that is plain and convincing beyond reasonable controversy will constitute such proof as will warrant a modification or reformation of a written agreement'."*

Likewise, the Minnesota courts have repeatedly held that to find mutual mistake warranting a judicial reformation, proofs must be clear and convincing. In many, if not all, of the authorities relied upon by Petitioners, extrinsic facts have been present in the cases which substantiated and corroborated the testimony accepted and relied upon by the courts. There are no such extrinsic facts in the case at bar to support or substantiate the flimsy and indefinite testimony of Baskfield, president of the Petitioner Company and attorney for the late Filben, who collaborated in the negotiation for the drafting of and the consummation of the Rock-Ola-Filben agreement.

Lacking ambiguity in the phrasing of that contract, the Court of Appeals was fully justified in departing from the findings of the lower Court, insofar as they imply anything in the nature of mutual mistake in the drafting of that agreement.

In *Leach* v. *Leach et ux.*, 202 N. W. 448, there had been a trial by jury in the lower Court, the jury finding that a certain promissory note being sued upon, was intended to represent an advancement to the Defendants, or one of the Defendants, son of the Plaintiff.

It is to be noted that the Minnesota Supreme Court found it proper and desirable to give consideration to the evidence which was before the jury in the lower Court. This is evidenced by the following language:

"*In examining the evidence, we* have kept in mind the rule * * * that when a voluntary gift of prop-

* Quoting from *Bailey* v. *Lisle Mfg. Co.*, 238 Fed. 257, 266.

> erty is claimed, the claim should be subjected to close scrutiny and rejected unless supported by satisfactory and convincing evidence, and *have concluded* that the evidence was sufficient to warrant the jury in finding that Appellant gave the money to her son as an advancement." (l. c. 450—emphasis ours.)

One of the earlier cases relied upon by the Minnesota Court in the case from which we have just quoted, is *Scofield* v. *Quinn*, 55 N. W. 745, where the Supreme Court of the State reversed the lower Court after consideration of the proofs with respect to a deed and a written instrument, finding that there was ground for the intervention of equity to protect the real purpose of the original contracting parties, mother and daughter.

The Court in this last cited case, referred to a still earlier case, *Benson* v. *Markoe*, 33 N. W. 38, in which is laid down the general rule as to the necessity for clear and convincing proofs in cases presenting an issue of mutual mistake, set forth in the following words:

> "But this jurisdiction will be exercised with caution, *Only very clear and convincing proofs will be sufficient to overcome the presumption that the written instruments which parties have executed for the purpose of evidencing and carrying into effect their agreements, are in legal effect, or in terms contrary to their intention*" (l. c. 40—emphasis ours).

Again, in *Segerstrom* v. *Holland Piano Mfg. Co.*, 192 N. W. 191, the Minnesota Court announced the same rule:

> "Equity will not reform a written instrument on the ground of mistake, unless the evidence is clear and convincing (citing cases).
>
> • • • The evidence in this case very clearly sustains the finding that the verbal agreement of the parties was as Plaintiff claims" (l. c. 192).

There, there was found mutual mistake on the part of both parties to an agreement, as to the effect of certain words

which were used in the agreement, and the Court pointed to extrinsic facts which supported the Plaintiff's contention and the testimony in support thereof.

In *Wall* v. *Meilke*, 94 N. W. 688, the Minnesota Court also stated and recognized the requirement as to evidence required to justify a reformation, in the following language:

> "* * * the true rule is that equity will not reform an instrument on the ground of mistake, unless the evidence is clear and convincing, * * *" (l. c. 692).

In *Papke* v. *Pearson*, 280 N. W. 183, the Supreme Court of Minnesota again cited and relied upon *Benson* v. *Markoe, supra* for the rule with respect to reformation of agreements on the ground of mutual mistake by the parties. Incidentally, the Supreme Court obviously took occasion to review and weigh the evidence before the lower Court with respect to the intention of the contracting parties, and held:

> "Since the evidence is conclusive that such was the intention, the findings and conclusions should be modified in conformity therewith. * * *
> * * * The order as modified is affirmed" (l. c. 186).

In *Wilmot* v. *Minneapolis Automobile Trade Association*, 210 N. W. 861, relied upon by Petitioners, there was ambiguity in the contract before the Court, and the Court turned to testimony that the accounting practice which had been followed by the parties for years, was the proper practice to rely upon in determining the ambiguity in the agreement.

In Re Soper's Estate, 264 N. W. 427, the Court cited the *Wilmot* case, (*supra*) and approved the use of parol evidence to determine that the term "wife", as used by the settlor of an insurance trust, properly meant the woman

to whom he had been illegally married and with whom he was living openly in the pseudo-relation of man and wife at the time the trust was executed. In that case, obviously there was an element of ambiguity, but the extrinsic facts were relied upon in the appraisal of the parol testimony in enabling the Court to resolve that ambiguity to determine real intent of the settlor.

In *City of Marshall* v. *Gregoire*, 259 N. W. 377, the Court construed a bond protecting the City with respect to the performance of its Treasurer. The bond contained the provision that the Treasurer "shall well and faithfully perform all the duties of his said office". There was also included an exemption of the surety for loss "caused by the failure of any bank, institution, or depository of any kind" to repay City funds deposited with it. The Treasurer, in violation of a State Statute, deposited City funds in a bank of which he was a stockholder, director, and assistant cashier. The bank failed.

The Court held that by violating the State Statute and depositing the City funds in such bank, he had not "well and faithfully" performed his duty in accord with the condition of the bond.

The Court did not specifically find mutual mistake.

Petitioners have also cited *Burnet* v. *Hopwood et al.*, 244 N. W. 254. In that case, the Minnesota Court construed a partnership agreement as to which there was a controversy between the parties as to the division of the partnership funds upon withdrawal of one partner.

The Court noted that for several years distribution of the profits had been on a certain percentage basis and this was continued after entry into a partnership contract.

The Court pointed out that where certain language in the agreement was capable of different constructions, the Court was empowered to adopt that which was most reasonable in view of the facts and the conduct of the parties.

Acquiescence and conduct of the parties was also adverted to.

There was really no issue of mutual mistake in this cited case; rather, one of construction of certain language in the agreement.

The case is of interest in the enouncement by the Court of the rule which we believe to be pertinent to the case at bar. We quote from the syllabus by the Court, as follows:

> "3. Where the wording of a written contract is unambiguous, the intention of the parties must be deduced from the language used. If the language is susceptible of different constructions, as far as reasonably possible, a construction is to be avoided which would lead to unjust or absurd results" (l. c. 254).

It is to be noted in this last cited case, that the Supreme Court took upon itself to review the evidence before the lower Court, whose findings and decisions were reversed.

In *A. E. Little Co.* v. *John W. Thomas, Inc.*, 218 N. W. 242, it is to be noted that the Supreme Court of Minnesota did not hesitate to review the evidence and testimony which had been adduced before the lower Court and to reach an opposite conclusion, which led it to reverse the lower Court. In short, the findings of the lower Court were not held binding upon the Supreme Court of the State.

In that case, there was a question as to the import and meaning of the term "extended", as applying to a lease between parties. The Supreme Court found that the extension of the lease contemplated by the agreement was a formal extension, and did not cover a permissive occupancy or tenancy from month to month, without any formal extension of the lease. There is no pertinence in that case to the contentions of the Petitioners here.

It is to be noted in passing that a number of the Minne-

sota cases relied upon by Petitioners presented situations where one or the other, or both, of the contracting parties did not utilize the services of a lawyer. In some cases, there was a family relationship which exercised some measure of influence upon the Court, and in others were involved insurance policies, in which the Minnesota Courts are prone to lean heavily upon the side of an insuree, particularly where there was misrepresentation and he could not, or did not, understand some of the terms of his policy.

The Court of Appeals in the case at bar, took occasion to point out that:

> "The parties to the license agreement were *sui juris*; each of them was represented by his own counsel during the negotiations leading up to the making of the agreement and at the time of its execution" (Rec. 146).

The Court then pointed to the rule as defined in an earlier decision, *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co.*, 23 F. 2d 628.

Apparently recognizing the handicap imposed upon Respondents and upon the Appellate Court by the failure of the District Court to accompany its findings and conclusions with an opinion, the Court of Appeals also said:

> "It is argued by Defendants that the right of reformation may be used defensively, and that it was so used here by Defendants in the trial at Court. One of the troubles about this argument is that the trial Court did not purport to grant reformation of the contract, but construed it as granting to the Filben heirs the same rights as possessed by him during his lifetime, including the right to transfer to a corporation organized and controlled by them. There is nothing to indicate that the Court reformed the contract as written; neither did the Defendants seek such reformation" (Rec. 149).

Judge Nordbye of the District Court of Minnesota, in

Preferred Accident Insurance Co. of N. Y. v. *Onali et al.*, 43 F. Supp. 227, applied the rule in words which reiterate the decisions of the Minnesota Supreme Court:

> "At the outset, in discussing the question of defendant Onali's right to a reformation of the contract, it is generally recognized that before a court of equity will reform a written instrument, it must appear that there was an antecedent agreement and that the writing failed to express the true intention due to a mutual mistake, or a mistake on one side and fraud or inequitable conduct on the other. *Further, these facts must appear by clear and not doubtful evidence. Norman* v. *Kelso Farmers' Mutual Fire Ins. Co.*, 114 Minn. 49, 130 N. W. 13" (l. c. 231—emphasis ours).

In still another case, the Minnesota Supreme Court was considering an asserted mutual mistake in the formation of an insurance contract and pointed out that it must appear that there was, in fact, a written contract which failed to express the true intentions of the parties thereto, and that this failure was due to mutual mistake, or to a mistake on one side and fraud or inequitable conduct on the other. The Court referred to and quoted from a still earlier case, *Fritz* v. *Fritz*, 102 N. W. 705, from which it quoted the rule which is applicable to the case at bar:

> "'(b) These facts must be established by competent evidence, which is consistent and not contradictory, clear and not equivocal, convincing and not doubtful.'" *Norman* v. *Kelso Farmers' Mutual Fire Ins. Co.*, 130 N. W. 13.

The Court of Appeals was fully empowered to reject the disputed findings and conclusions of the District Court and was fully justified in so doing.

It is repeatedly insisted by Petitioners that the findings and conclusions of the District Court are, or were, binding upon the Court of Appeals and should have been accepted by that Court without question.

To state that contention seems to us to make manifest its absurdity.

We have no quarrel with the general practice of the Courts in accepting findings of a lower Court where they are supported by competent and adequate evidence. In this case they were not.

The lower Court did not specifically find that there was mutual mistake in the drafting of the Filben-Rock-Ola agreement. It did hold without an opinion, that it was the "intent of the parties to grant, and that there was granted to Filben's heirs the right to transfer and assign their license rights to a corporation controlled by them" (Rec. 122).

As to that, the Court of Appeals pertinently pointed out:

> "The parties to the license agreement were *sui juris;* each of them was represented by his own counsel during the negotiations leading up to the making of the agreement and at the time of its execution. There was no claim of over-reaching, fraud, or mutual mistake" (Rec. 146).

While Petitioners apparently do not agree with the holding that there was no claim of mutual mistake, they have not challenged the indisputable fact that there was no claim and can be no claim of over-reaching or fraud.

Therefore, mutual mistake must be shown and established by adequate proof to justify a right of reformation of the Rock-Ola-Filben agreement.

Now let us review the scanty proof upon which Petitioners base their claim of mutual mistake.

It consists entirely of the testimony of Leonard Baskfield. It should be kept in mind that Baskfield had been long engaged in practice of law and had been long associated with Filben when he collaborated and assisted in the drafting of the Filben-Rock-Ola agreement (Rec. 68, 69).

Several meetings were had between Baskfield and the patent attorney for the Respondents, James A. Davis of Chicago, with the purpose of agreeing upon the terms of a cross-license arrangement between the late Filben and Rock-Ola Manufacturing Corp. (Rec. 69, 70).

Mr. Baskfield continued the phonograph business of Filben after the death of the latter, for Filben's heirs, under the fictitious name previously adopted by Filben, Filben Manufacturing Co. (Rec. 98), and in that capacity conducted the manufacture and sale of "upwards of a thousand" phonographs prior to his entry into the armed services (Rec. 101, 102).

Upon the formation of Petitioner, Filben Manufacturing Co., Inc., by Baskfield in October, 1945, Baskfield became president and was issued 49 per cent of the stock in that corporation, which currently has been reduced to 33 per cent (Rec. 90, 103, 106).

So it is clear from the admissions of Baskfield himself, that he is definitely an interested party, and his testimony should be evaluated in the light of that fact.

The Rock-Ola-Filben agreement began to take form, according to Baskfield, at a meeting in the office of Filben's patent solicitor (Rec. 70), and a draft was dictated jointly to that solicitor's help by Mr. Baskfield and Mr. Davis. After subsequent telephone calls and correspondence, Mr. Baskfield states that further discussion was had with re-

spect to the rights to run to Filben's heirs (Rec. 71), and that he requested "that something be done to take care of the heirs so they would stand in the shoes of Mr. Filben."

Parenthetically, it may be said that the heirs would ultimately stand in the shoes of Mr. Filben after his death, in some degree, when they succeeded to his license under the Rock-Ola-Filben agreement.

Baskfield boldly testified that he assumed that the heirs would "stand in the shoes of Mr. Filben in the event of his death" (Rec. 72, 73).

Mr. Baskfield's answer to questioning and direct examination in one portion thereof is of interest:

> "Q. Did you have any conversation with Mr. Davis with respect to the question as to whether or not the language actually employed by him in paragraph 4 would confer upon Filben's heirs the same rights that the agreement conferred upon Mr. Filben?
>
> A. Your question is, did we have any conversation regarding that?
>
> Q. Yes, sir.
>
> A. Well, we have discussed it frequently over the years since then. *I don't recall if we had any then*" (Italics ours—Rec. 72).

That testimony clearly indicates an attempt by Baskfield to avoid a direct and unequivocal answer that both he and Mr. Davis were agreed and had the intent that the Rock-Ola-Filben agreement should extend to Filben's heirs his right to assign his interest under the Rock-Ola-Filben agreement to a corporation owned and controlled by him.

It is conceivable that Mr. Davis did agree that the proposed contract should provide for succession by the heirs to Filben's interest in that contract, and to that extent "stand in his shoes." It is inconceivable, however, that any lawyer of at least average intelligence and experience

would not recognize at a glance that the contract, as ultimately drawn and signed by Filben and Respondent, did not provide for the succession of Filben's heirs to the right to assign their interests in that contract to a corporation, as has been attempted in the case at bar.

Mr. Rockola, president of Respondents, was asked in cross-examination:

> "Q. Did you intend, Mr. Rockola, at that time that Mr. Filben's heirs should possess the same rights that Mr. Filben possessed under the agreement?"

His answer was succinct and to the point:

> "A. No" (Rec. 67).

Mr. Davis, who represented the Respondent in negotiation for and drafting of the Rock-Ola-Filben agreement, was interrogated, and we quote briefly from the testimony:

> "Q. Now, coming to the matter of your intent with respect to limitations upon the license granted to the late Mr. Filben, will you state what it was?
>
> A. The intent was to limit that license to an individual having a relatively small business, or to a corporation organized and controlled by him, the license itself was to descend to the heirs of Mr. Filben.
>
> Q. Was there any intent in your mind or activity with respect to the consummation of this agreement that the right to assign to a corporation the interests inherited by the Filben heirs should be vested in them?
>
> A. Certainly not" (Rec. 113).
>
> * * * * *
>
> "Q. Is there any particular reason why you were willing to permit this license agreement to descend to his (Filben's) heirs, but not to a corporation owned or controlled by his heirs?
>
> A. Yes" (Rec. 116, 117).

So we have as proof of the alleged mutual mistake in the drafting of the Rock-Ola-Filben agreement only the vague and somewhat equivocal testimony of Mr. Baskfield, defi-

nitely an interested party, and the lawyer who was closely associated with Mr. Filben and who represented him in negotiations for and the consummation of the agreement, and this is definitely and clearly controverted, insofar as it may support a contention of mutual mistake, by the unequivocal testimony of Mr. Rockola and Mr. Davis.

Certainly, here is no "clear and convincing proof" establishing that there was, in fact, mutual mistake in the drafting of the agreement.

As we have asserted before, the Court of Appeals did not depart from the fundamental principles or doctrines applied by the Supreme Court of Minnesota in the decision of cases involving a charge of mutual mistake in the drafting of an agreement, when it said:

> "The mistake must be mutual, or unilateral mistake induced by fraud. There must be in effect an agreement which the written instrument evidences, and the mistake must have been in drafting of the instrument, not in making of the contract" (Rec. 150).

It is interesting to note the contrast between the position of District Judge Bell in deciding the case at bar, and his position in his decision in the recent case of *Northern Pac. Ry. Co.* v. *United States*, reported at 70 F. Supp. 836, wherein there was before him a contract between the Railway and the United States, the parties being in disagreement as to freight rates charged against Defendant. While the decision is a lengthy one, it is only necessary to point out that the Court was confronted with the necessity to determine whether the contract between the parties was to be limited to construction activities of a low dam (Grand Coulee). We quote excerpts from that decision which we deem pertinent to the instant case, and Petitioners will hardly have the temerity to argue that Judge Bell was not familiar with the law of the State of Minnesota:

"The meaning of a contract should be ascertained from the language of the written instrument itself, and where the provisions are plain and unambiguous the contract is conclusive" (citing cases, including a Minnesota case) (l. c. 848).

* * * * *

"A Court will not resort to rules of construction where the intent of the parties is expressed in clear and unambiguous language" (again citing cases) (l. c. 849, 850).

* * * * *

"When a contract is reduced to writing, all matters of negotiation and discussion on the subject antecedent to and dehors the writing, are excluded as being merged in the instrument" (cases) (l. c. 855).

* * * * *

"Where reformation is sought because of the mistake of one party only, it is essential that fraud be found in the other, and that the fraud was perpetrated to induce the making of the contract, and although a ground for rescission and cancellation, it is not ground for reformation" (l. c. 866).

It is to be noted that in support of the last quoted excerpt, Judge Bell included among cases cited as supporting it, *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co., supra.*

There was no incongruity or absurdity in denying to the Filben heirs, the right to assign their license to a corporation controlled by them.

The record makes quite clear the fact that Filben was only functioning as an operator of coin-controlled phonographs prior to his death (Rec. 98, 99); whereas, following his death, Baskfield, as representative of the heirs, manufactured and sold "upwards of a thousand" Filben phonographs several years prior to the organiaztion of Petitioner, Filben Manufacturing Co., Inc. (Rec. 101). Incidentally, the sales were never reported under the Rock-

Ola-Filben agreement, nor was any tender of royalties made (Rec. 102).

Obviously, if the business of the late Filben could be extended to the substantial manufacture of these licensed phonographs by or on behalf of the heirs after Filben's death, it can hardly be argued logically that there was anything onerous or incongruous in the restriction imposed upon the heirs which precluded their assignment of their license rights to a corporation.

If business or other conditions since that time work a hardship upon the heirs, that cannot be blamed upon Respondents or treated as anything material or relevant to the charge of mutual mistake in the drafting of the agreement.

The Affidavit accompanying Petitioners' Petition and the allegations with respect to subsequent infringement suits instituted by Petitioners against infringers not parties to this suit are wholly irrelevant and impertinent.

We shall not argue the propriety generally of endeavoring to inject collateral facts and issues into this controversy by Affidavit of counsel, wholly unsupported by the record, but we do insist that the assertions relative to the filing of infringement suits subsequent to the decision of the Court of Appeals and the possibility of a volume of litigations are *dehors* the record and the issues in the case at bar and are wholly impertinent.

Certainly, Respondents cannot be denied the right to assert their patents against those whom they deem to be infringers, particularly, where such infringers are not parties to this suit.

We could counter the Affidavit complained of with other Affidavits, but we consider it would merely impose an unnecessary burden upon the Court, and would be entirely

uncalled for in view of the impertinence and irrelevance of Petitioners' Affidavit and the allegations based upon it.

Conclusion.

In conclusion, we submit that:

(1) The rule under the Minnesota law in cases involving reformation of contracts requires at least clear and convincing proof of mutual mistake.

(2) The holding of the Court of Appeals was entirely consonant with the rule applied by the Minnesota State courts where reformation of an agreement is sought, or the right to reform is relied upon, as is made amply clear by reference to the Minnesota Supreme Court decisions.

(3) The Court of Appeals was entitled to review the record in the case and to find, as it did, that the findings and conclusions upon which the District Court based its decision in favor of Petitioners were unwarranted and unsupported by adequate and convincing proofs, and in so doing, to decide adversely to the decision of the District Court.

(4) The wholly unsupported and controverted testimony of an interested party, a lawyer who participated in the drafting and consummation of the Rock-Ola-Filben agreement, was insufficient to establish mutual mistake in the drafting of that agreement, particularly in view of the rebuttal testimony of two other witnesses of Respondents, and more particularly in view of the plain, clear, unambiguous reading of the Rock-Ola-Filben agreement as to those portions which are involved in this controversy.

(5) There would be no security or sanctity in a formal written agreement if at any time the lawyer for one party who participated in the drafting of such a contract, were permitted to broaden its scope and extend the rights granted to one party by mere verbal

testimony, of the character offered here by Mr. Baskfield, in defiance of the plain and unambiguous reading of such contract.

We respectfully submit that the Petition for Writ of Certiorari should be denied.

THOS. H. SHERIDAN,
Attorney for Respondents.